No. 89-1541

FILED
SEP - 18 1990
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

AND

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INDUSTRY COUNCIL ON THE ENVIRONMENT, SAFETY, AND HEALTH, AND THE UNITED STATES HISPANIC CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an order of the Occupational Safety and Health Review Commission adopting a permissible interpretation of an ambiguous regulation that implements the Occupational Safety and Health Act of 1970 is controlling on the courts when the Secretary of Labor disagrees with the Commission's interpretation.

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INTEREST OF THE AMICI [1]

The Chamber of Commerce of the United States of America (Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia,

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[1] This brief amici curiae is filed with the consent of all parties. Letters acknowledging this consent have been filed with the Clerk of the Court.

is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The vast majority of its members are subject to the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651-678. The Chamber regularly represents the interests of its member-employers in important employment matters before the courts, the United States Congress, the Executive branch, and independent regulatory agencies of the Federal Government.[2]

The Industry Council on the Environment, Safety, and Health (ICESH) is an organization of companies formed to address compliance and enforcement issues arising out of government enforcement activities under federal occupational safety, health and environmental laws. At present, ICESH has twenty member companies representing the following industries: paper, hazardous waste handling and control, transportation, glass, basic minerals, chemical, petrochemical, petroleum, and consumer products. Such industries are covered by the OSH Act.

The United States Hispanic Chamber of Commerce (Hispanic Chamber), a nonprofit corporation organized and existing under the laws of the State of New Mexico, is the foremost national Hispanic business organization. It represents the interests of the nearly 400,000 Hispanic business enterprises operating in the United States, as well as state and local Hispanic chambers of commerce. The Hispanic Chamber regularly monitors legislative, regulatory, and judicial developments that affect Hispanic entrepreneurs.

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[2] The Chamber has sought to advance those interests in a wide spectrum of employment law litigation before this Court. *See, e.g., Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989); *Laborers' Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

The Chamber, ICESH, and the Hispanic Chamber have a significant interest in the question presented in this case. Their members frequently appear before the Occupational Safety and Health Review Commission (Commission) in challenges to the enforcement actions of the Secretary of Labor under the OSH Act. The ability of the Commission to function effectively as the OSH Act's adjudicator on issues of both fact and law is vitally important to the members of the Chamber, ICESH, and the Hispanic Chamber. Therefore, the Chamber, ICESH, and the Hispanic Chamber are seriously concerned that the balance of administrative power struck by Congress in the OSH Act be preserved.

Indeed, during congressional consideration of the bills which gave rise to the Occupational Safety and Health Act, the Chamber and other business groups supported passage of a substitute bill proposed by Senator Dominick. That bill laid the ground work for the establishment of the Commission by proposing both a standards board and an adjudicatory board. S. 4404, 91st Cong., 2d Sess. (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 73 (Comm. Print 1971) (*Leg. Hist.*). The establishment of an independent agency was crucial to business support. As Walter J. Burke, the then-Secretary-Treasurer of the United Steelworkers of America, stated in opposition to the Dominick substitute:

> Last year a number of employer-oriented organizations and trade associations testified in opposition to the need for Federal occupational health and safety legislation. This year the field has been reversed. The one substantively new thing, which has been added, is the board.

Hearings on H.R. 13373 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st Sess. 927, 935-38 (1969), *quoted in* B.

Mintz, *OSHA: History, Law, and Policy* 23 (1984). While the Dominick bill was ultimately defeated, the concept of an independent review commission survived. *Amici* believe that, if the Secretary's position is accepted here, it will undo the legislative compromise that ultimately gained the support of the business community and allowed passage of the Occupational Safety and Health Act.

STATEMENT

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651-678, calls for adoption of a broad range of safety and health standards by the Secretary of Labor. In 1976, pursuant to this direction, the Secretary adopted a standard on exposure to coke oven emissions. 41 Fed. Reg. 46,742-90 (1976). The standard requires that employers limit their employees' exposure to coke oven emissions to a permissible level and specifies a number of techniques to be used to achieve this goal. *See* 29 C.F.R. §§ 1910.1029(c), (f). The standard also recognizes, however, that in some instances it will not be feasible to reduce emissions sufficiently, and calls for use of respirators to limit employee exposure in such circumstances. *Id.* § 1910.1029(g).

In 1979, a compliance officer from the Occupational Safety and Health Administration (OSHA), an office in the Department of Labor to which the Secretary has delegated most of her OSH Act responsibilities, inspected respondent CF&I Steel Corporation's (CF&I) coke oven facility in Pueblo, Colorado. The compliance officer issued a citation for an alleged violation of the respirator portion of the coke oven emissions standard. Specifically, the compliance officer found that 28 of CF&I's employees had been issued respirators that did not fit properly when worn in a "test atmosphere." The compliance officer concluded that this failure to ensure a proper fit violated 29 C.F.R. § 1910.134(e)(5), a general standard on respirators incorporated by reference into the coke oven emissions standard. *See id.* § 1910.1029(g)(3). Curiously, the compliance officer did not cite CF&I for a violation of subsection (g)(4) of the coke oven emissions standard, which provides:

> The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

Id. § 1910.1029(g)(4)(i). The compliance officer apparently chose not to rely on this subsection out of a mistaken belief that its enforcement had been suspended. Pet. App. 43a n.13.

Following the administrative procedures set out in the OSH Act, CF&I contested the citation before the Commission. An administrative law judge from the Commission affirmed, but on review the Commission vacated the citation. The Commission noted that the standard "make[s] a distinction between training in respirator use and assurance of proper respirator fit," regulating the former through subsection (g)(3) and the latter through subsection (g)(4)(i). *See* Pet. App. 41a. The Commission concluded that the Secretary had relied on the wrong portion of the standard in citing CF&I for violation of § 1910.1029(g)(3); and the Commission noted that the possible application of subsection (g)(4)(i) had been raised in the proceedings, and that the Secretary had chosen to defend the compliance officer's construction of subsection (g)(3) (and 29 C.F.R. § 1910.134(e)(5)) rather than move to amend the citation. Pet. App. 43a-44a & n.13.

The Secretary sought review of the Commission's decision in the United States Court of Appeals for the Tenth Circuit. *See* 29 U.S.C. § 660(b). Noting that the two agencies with administrative responsibilities under the OSH Act were taking opposing positions on the interpretive issue before it, the Tenth Circuit saw the question as "to whom is deference owed?" Pet. App. 4a. The Court concluded that the Commission was entitled to deference because it is assigned adjudicatory respon-

sibilities under the OSH Act and thus by statute has the final say on questions of law arising in adjudicatory proceedings. Pet. App. 5a-7a. Finally, the court found that the Commission's construction of § 1910.1029(g)(3) was reasonable and, accordingly, affirmed. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

A. Combining some or all of an agency's functions—particularly, the prosecutorial and adjudicatory functions—carries with it a recognized potential for unfairness. Congress generally has sought to alleviate this potential for unfairness by requiring that these functions be separated within an agency. On occasions, Congress has gone further by separating out responsibility for one of these functions and giving it to an independent agency. The OSH Act is such an occasion.

In the OSH Act, Congress has delegated exclusive authority for "adjudicative functions" to the Commission. Rulemaking and enforcement authority were conferred upon the Secretary, but each power was carefully limited by Congress. The Secretary must follow certain procedures in exercising the rulemaking power. In the enforcement process, Congress placed the burden on the Secretary to establish all elements of an alleged violation—factual and legal. Moreover, the Secretary's enforcement authority is subjugated to the Commission, which Congress has authorized to issue orders affirming, modifying, or revoking proposed citations. This delegation of adjudicative authority to the Commission belies any argument that Congress intended the courts to give "controlling weight" to the positions taken by the Secretary in litigation; on the contrary, it suggests that Congress intended the courts to give such deference to the Commission's decisions.

The legislative history confirms that Congress intended the Commission, and not the Secretary, to have the final say in the administrative process concerning the meaning of ambiguous OSH Act provisions and implementing

regulations. It shows that, in creating the Commission, Congress intended to limit the Secretary's prosecutorial power and to confer upon the Commission the full complement of adjudicative powers available to the National Labor Relations Board and the Federal Trade Commission, two agencies which have long been recognized to exercise policymaking authority through adjudication. It further shows that Congress created this split in administrative authority in order to address concerns in the regulated community that the Secretary was the "voice of labor"; stated differently, it did so in order to reassure the regulated community that alleged violations of the statute would be resolved independently and objectively. Giving deference to the Secretary rather than the Commission would deprive the regulated community of the reassurance of independence and objectivity that it was promised and thus unravel the political compromise struck by Congress.

B. The Secretary and the AFL-CIO seek to justify their attempt to undo the legislative compromise by reference to general principles of administrative law. But general principles of administrative law do not support their effort.

Contrary to their argument, the Secretary's status as a "policymaker" under the OSH Act does not require deference to the interpretations that she develops in the adjudicative process. This Court has never given "controlling weight" to agency litigation positions that are wholly unsupported by regulations, rulings, or administrative practice.

Their suggestion that the conferral of administrative adjudicatory authority on the Commission does not include a policymaking function also is incorrect. Under established principles of administrative law, the power of an administrative agency to adjudicate legal questions presumptively includes a substantial policymaking component. The legislative history of the OSH Act confirms that the Commission was intended to have such power.

The Secretary and the AFL-CIO similarly err in suggesting that the Secretary's role in promulgating the coke oven emissions standard requires that her interpretation be given "controlling weight" by the courts. The Secretary did not draft the relevant portion of this regulation. Moreover, involvement in the regulatory drafting process would at most establish the authority to reach an interpretive issue; it would not establish that that authority has been exercised in a form sufficient to have the force and effect of law.

Nor does the alleged expertise and experience that the Secretary has acquired in enforcing these regulations allow "controlling weight" to be given to her prosecutorial determinations. It is the Commission, not the Secretary, who is by statute deemed expert in these matters. Indeed, the Commission is just as involved as the Secretary in matters that are likely to raise the deference question—*i.e.*, contested cases. In any event, while expertise and experience may contribute to an agency's ability to persuade the courts, it does not properly contribute to its power to control the courts.

Finally, there is no basis for suggesting that a rule of deference to the Commission will undermine the stability of the OSH Act regime. A rule of deference to the Commission has thus far prevailed in a large number of circuits without any such consequences occurring; and the Secretary has ample means available to her for preventing any such destabilization from occurring. In all events, such policy arguments are more appropriately addressed to Congress.

C. The statutory analogues to which the Secretary points do not support her cause. The Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950, is a completely different statutory scheme, and conclusions about deference owing the Benefits Review Board under that regime obviously cannot be imported here. The Federal Mine Safety and Health Act

of 1977, 30 U.S.C. § 801 *et seq.*, is more like the OSH Act, but again differences in statutory language and purpose make any attempted analogy between the two schemes difficult at best. In all events, the case law under these two statutes does not clearly establish any kind of deference rules; thus, there are no clear statutory analogues that the Court can rely on in reaching its decision here.

ARGUMENT

The OSH Act, like many landmark statutes, reflects a compromise among several competing versions. The Act's administrative structure was a particular focus of congressional debate, and the final system installed by Congress represents a delicate balance of power between the two agencies charged with its administration: the Secretary and the Commission. The Secretary's position in this case seeks to upset that balance and to undo the compromise struck by Congress. Specifically, she seeks to arrogate to herself a decisionmaking authority—*i.e.*, the authority to resolve regulatory ambiguities in the adjudicatory process—that Congress expressly denied her and conferred instead on the Commission. In doing so, the Secretary ignores the OSH Act's structure and legislative history and, furthermore, misconceives the basis for judicial deference to administrative agencies.

A. Deference To The Commission's Interpretations Of Ambiguous Statutory And Regulatory Provisions Is An Essential Part Of The Compromise Developed By Congress In Enacting The OSH Act

1. Modern administrative agencies perform a variety of functions in carrying out the tasks assigned to them by Congress. Agencies formulate rules, inspect the regulated parties to monitor compliance with statutory obligations, investigate potential violations, prosecute alleged violations, and adjudicate alleged violations. Combining some or all of these roles—particularly, the prosecutorial and adjudicatory roles—in a single agency carries with

it a potential for unfairness. Congress generally has sought to alleviate this potential for unfairness by requiring that these functions be separated within a given agency. Thus, the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, the "embodiment" of "general principles of administrative law," generally requires that participants in the prosecutorial and adjudicatory functions in an agency be separated. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring); 5 U.S.C. § 554(d) (APA); 1 C.F.R. § 305.86-4 (Administrative Conference Recommendation 86-4).

With such an internal separation of functions in place, the concerns over unfair agency adjudications are eased somewhat. Yet, ultimately, functions that are informally separated "come together at the top in the person of the head . . . of the agency, who, through subordinates, [is] responsible for all three functions"—rule formulation, prosecution, and adjudication. 1 C.F.R. § 305.86-4 (Administrative Conference Recommendation 86-4). Thus, "internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency." *Id.* Such concerns over the fairness of administrative adjudication have led Congress on several occasions specially to separate one or more of these agency functions.

One prominent example is the General Counsel of the National Labor Relations Board (NLRB) and the NLRB itself. As the Court noted in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 117-18 (1987), "[o]ne of the major goals" of the Labor-Management Relations Act (LMRA), 61 Stat. 136 (1947), was to "divide the old Board's prosecutorial and adjudicatory functions between two entities," the Board and the newly-created position of General Counsel of the Board. Congress determined that the General Counsel "should be

independent of the Board's supervision and review," and therefore installed him as the final authority on investigatory and prosecutorial matters. 484 U.S. at 118. The Board retained its role as the rulemaker and administrative adjudicator.

The OSH Act is another variant on this theme of separated powers. In the OSH Act, Congress granted general rulemaking powers to the Secretary. *See* 29 U.S.C. § 655. In addition, it authorized the Secretary to conduct investigations and, if warranted, issue citations alleging a violation of established standards or the general duty clause of the Act. *See id.* §§ 654, 657-658. It established the Commission, however, as the final administrative adjudicator on any citation. *See id.* § 659. The statutory scheme thus reflects a special concern on the part of Congress that the prosecutorial and adjudicative functions under the OSH Act should be completely separated.

2. The Secretary and the AFL-CIO argue (Pet. Br. 20-33; AFL-CIO Br. 6-15) that deference to interpretations developed by the Secretary in litigation is not only consistent with Congress' special concern for the separation of prosecutorial and adjudicatory functions under the OSH Act, but is in fact mandated by Congress' decision to confer rulemaking power on the Secretary. This argument is inconsistent with both the structure and legislative history of the OSH Act scheme.

a. In terms of statutory structure, the OSH Act quite clearly confers authority on the Commission—not on the Secretary—to resolve legal issues arising in the adjudicatory process. Moreover, while Congress conferred rulemaking power on the Secretary, it required that she exercise that power only pursuant to specified rulemaking procedures; and, in the adjudicatory process, Congress clearly intended for the Commission to be supreme.

The OSH Act delegates to the Commission exclusive authority for "adjudicative functions" under the statute.

29 U.S.C. § 651(b)(3). It requires the President to appoint to the Commission persons who have the "training, education, or experience" to fulfill these functions. *Id.* § 661(a). The Act also authorizes the Commission to issue orders, based on findings of fact, affirming, modifying, or revoking proposed citations. *Id.* § 659(c). The authority to issue such "orders" carries with it the authority to declare "what the law was." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 927 (1965). For this reason, courts have long concluded that "the Commission was designed to have a policy role" (*Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974)), and that "the Commission's interpretations . . . should be given substantial deference by a court." *Brennan v. OSHRC*, 501 F.2d 1196, 1198-99 (7th Cir. 1974).

Concomitantly, while the OSH Act confers rulemaking authority on the Secretary, it places special limitations on the exercise of that authority and subordinates the Secretary's authority in the enforcement process to that of the Commission. Specifically, the OSH Act requires the Secretary to follow elaborate procedures—involving use of advisory committees, notice and comment procedures, hearings, and delays in effective dates—in promulgating, modifying, or revoking any safety or health standard. 29 U.S.C. § 655(b). Moreover, although the OSH Act authorizes the Secretary to conduct inspections and issue citations, it places "the burden . . . on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 446 (1977). Indeed, the Act makes it clear that, with respect to contested citations, the Commission is fully authorized to affirm, vacate, or modify either the citations or the proposed penalties. 29 U.S.C. § 659. Furthermore, the Act provides that all citations, whether contested or not, become enforceable only as final "orders" of the Commission—orders that are self-executing after issuance by the Commission. *Id.* Thus, there is no basis for the suggestion that the conferral of rulemaking power on the Secretary indicates a congressional desire that deference should be given to the interpretations that the Secretary advances in the adjudicative process as well; on the contrary, the statutory structure indicates that Congress intended precisely the opposite result.

b. This conclusion is reinforced by examination of the legislative history. That history shows that the administrative structure of the OSH Act was the source of considerable debate in Congress, and it explains that the ultimate, formal separation of functions in the OSH Act was a deliberate compromise aimed at severely limiting the power of the Secretary in the adjudicative process.

As originally conceived by the Senate and House Committees responsible for developing the legislation, the OSH Act vested the Secretary with responsibility for rulemaking, prosecution, and adjudication. *See, e.g.*, S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970) (Senate Report), *reprinted in Leg. Hist.* at 148, 155. As the Secretary notes (Pet. Br. 28), this concentration of administrative power was favored by organized labor. *See Leg. Hist.* at 323 (statement of Sen. Saxbe). Business interests were wary, however, of placing sole responsibility for such a wide-ranging and intrusive legislative initiative in a single administrative actor, and thus supported the competing Administration bill.[3] The Administration's

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[3] The OSH Act was viewed by employers as groundbreaking legislation in many ways. In addition to establishing mandatory nationwide safety and health standards on a wide range of topics and subjecting employers to significant penalties for violations of those standards (29 U.S.C. §§ 655, 666), the Act vested the Secretary with broad inspection powers (*id.* § 657(a)), and subjected em-

proposal gave the Secretary only the prosecutorial function, and proposed creation of two independent boards to perform the rulemaking and adjudicatory functions. *See* Senate Report at 54 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 193.

The Committee debate over these competing administrative structures was substantial, and "bec[a]me so bitter as to jeopardize seriously the prospects for enactment" of the statute. *Id.* at 55 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 194. In the Senate, for example, the Committee on Labor and Public Welfare rejected the Administration's proposal by a 10-7 vote, concluding that placement of "the responsibility and accountability for administration of the total program in the Secretary" was preferable to "establish[ing] a new agency and creat[ing] an unnecessary division of responsibility." *Id.* at 15, *reprinted in Leg. Hist.* at 155. Moreover, the Committee majority pointed out that the APA would ensure an informal separation of functions within the Department of Labor. *Id.*

Four members of the Committee remained unconvinced, and repeatedly attacked the concentration of all administrative authority in the Secretary. *See, e.g., id.* at 56 (individual views of Sen Javits), *reprinted in Leg. Hist.* at 195. Senators Dominick and Smith noted that, under the Committee's structure, "[f]ew safeguards or restrictions [we]re to be placed on the authority of the Secretary." *Id.* at 62 (minority views of Sen. Dominick and Sen. Smith), *reprinted in Leg. Hist.* at 201. Without such restrictions on the Secretary's authority, they feared abuse of power:

> A single man is easier to harass than an independent standards board or quasi-judicial panel. With the concentration of power in the hands of one man, he will be subject to intense political pressure to act a particular way.

Id. The dissenting Senators also noted that, under the Committee's administrative structure, agency adjudication would not alleviate these concerns. To the contrary, they found the adjudication envisoned by the Committee proposal to lack "the procedural safeguards necessary for fair determination of rights, responsibilities, and obligations of all parties." *Id.*

The primary difficulty the dissenting Senators saw was that the only route for an employer to challenge a citation issued by the Secretary was "through an appeal . . . to the Secretary for relief." *Id.* As Senator Javits noted, "[a]ny finding by the Secretary in favor of [the employer] would be essentially a repudiation by the Secretary of [her] own Department's employees." *Id.* at 56 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 195. Forcing the Secretary to "essentially act[] as prosecutor and judge," with "one official of the Department (e.g., the Deputy Solicitor) . . . tak[ing] the position of prosecutor and another official (e.g., the Solicitor) . . . tak[ing] the position of a neutral in order to advise the Secretary," would, they believed, completely destroy any confidence that employers might have in the fairness of the proceedings. *Id.* Senators Dominick and Smith added that any perceived lack of fairness in the adjudicatory process would undermine Congress' desire to promote voluntary compliance with the Act. *See id.* at 62 (minority views of Sen. Dominick and Sen. Smith), *reprinted in Leg. Hist.* at 201.

Overall, the Committee minority continued to prefer the Administration's approach, arguing that the broad reach of the OSH Act warranted a formalized division of authority. *Id.* at 54 (individual views of Sen Javits), *reprinted in Leg. Hist.* at 193. Senator Javits, in particular, concluded that a separation of functions, while

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ployers to potentially burdensome recordkeeping requirements. *Id.* § 657(c); *see also Leg. Hist.* at 469 (statement of Sen. Javits) (noting "unbelievable ramifications of [OSH Act] and the reach of th[e] law into countless numbers of workplaces throughout the country").

not necessarily required by notions of due process, would enhance the confidence of all parties in the administrative adjudicatory process. *Id.* He used the NLRB as an example, and asserted that independent administrative agencies such as the NLRB had established a better record "in the area of quasi-judicial adjudication" than had agencies with power concentrated in "cabinet-level officials." *Id.* at 55 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 194.

The debate over administrative structure that began in the Committee continued on the Senate floor, where ultimately the minority views found a more receptive audience. Before the Senate had formally taken up the Committee's bill and report, Senator Saxbe began the debate by announcing that a substitute bill mirroring the Administration bill would be introduced by Senator Dominick. Senator Saxbe then submitted a statement in support of the substitute, noting that "[t]he difference between the bills lies not in their purpose but in the type of structure each sets up for achieving that purpose." *Leg. Hist.* at 298 (statement of Sen. Saxbe). The statement detailed the Committee minority's criticism of the majority's approach, arguing that "[t]he reported bill is, in a word, unfair":

> [A]ll the good that could be achieved through a bill's education, research and enforcement provisions should not be rendered ineffective by inevitable disillusionment with its unfair regulatory procedures. Unfair regulatory procedures will only alienate employers from State and Federal officials who ought to to be guiding employers toward compliance.

Id. In Senator Saxbe's view, the unfairness stemmed directly from the "simplistic approach of placing all functions in the Secretary of Labor," which he considered comparable "to having the Chief of Police, in addition to his regular duties of conducting inspections, also write the criminal laws and then act as judge and jury." *Id.*

The more preferable approach, Senator Saxbe continued to believe, was "refocus[ing] responsibility for job safety and health by distributing the regulatory functions." Thus, under the substitute bill, "the Secretary of Labor would be authorized to conduct inspections and investigations . . . [but] would not hear the case and pass judgment on the offender." That function would be delegated to the Commission, which would "conduct hearings on alleged violations discovered by the Secretary . . . [and] on the basis of its decision, issue any necessary corrective orders, as well as assess civil penalties." *Id.*

Full Senate debate opened with Senator Williams defending the Committee's choice of administrative structure. *Id.* at 414 (statement of Sen. Williams). He argued that the Administration's approach "would result in such diffusion of responsibility and accountability as to seriously undermine the effectiveness of th[e] program." *Id.* at 417 (statement of Sen. Williams). Supporters of a separation-of-powers approach countered that "[t]he enormous amount of power given to the Secretary of Labor [by the Committee version] could easily be abused, culminating in a breakdown of existing Government neutrality in labor-management relations." *Id.* at 448 (statement of Sen. Tower). Indeed, the conflict on this issue ran so deep that Senator Dominick's substitute bill, which would have reinstated the administrative structure of the Administration's original proposal, was defeated by only a narrow, 41-39, margin. *Id.* at 449.

The next day, Senator Javits proposed a compromise. He abandoned his prior insistence on two independent boards to set standards and adjudicate violations, and called instead for a single independent entity to serve as the agency adjudicator. *Id.* at 462 (statement of Sen. Javits). Senator Williams immediately opposed the Javits proposal, arguing that, due to the APA's provisions, "there is no real or basic difference in the enforce-

ment procedures that would be followed under the committee bill and those provided for in the pending amendment." *Id.* at 466 (statement of Sen. Williams). For Senator Javits and those supporting his amendment, however, the informal separation of the APA was not enough; they believed that an independent adjudicative authority was necessary to enhance public confidence and to serve as an autonomous check on the prosecutorial power of the Secretary. *Id.* at 470 (statement of Sen. Javits); *id.* at 472 (statement of Sen. Dominick); *id.* at 473 (statement of Sen. Holland).

Senator Javits pointed out that the administrative structure that he proposed would mirror the relationship between the NLRB and its General Counsel: the Commission would perform the same "quasi-judicial functions" as the NLRB, and the Secretary would perform the prosecutorial functions given to the Board's independent General Counsel. *Id.* at 477 (statement of Sen. Javits). Senator Javits also analogized the role of the Commission to that of the Federal Trade Commission, suggesting that the Commission would have "the same type of authority that the Federal Trade Commission exercises. . . ." *Id.* at 462 (statement of Sen. Javits). The Javits amendment passed, 43-38, and was retained in the final version of the bill. *Id.* at 1147 (statement of Sen. Williams).

In short, the legislative history confirms that Congress intended that the Commission, not the Secretary, would have the final say in the administrative process concerning the meaning of ambiguous OSH Act provisions and implementing regulations. It shows that, while Congress conferred broad rulemaking powers upon the Secretary, it intended that the Secretary could exercise those powers only through the rulemaking process. Moreover, it shows that, in creating the Commission, Congress intended to limit the Secretary's prosecutorial power and to confer upon the Commission the full complement of adjudicative powers available to the NLRB and the Federal Trade

Commission, two agencies that have long been recognized to exercise policymaking authority through adjudication. *See Shapiro, supra*, 78 Harv. L. Rev. at 927-29. Congress did so in order effectively to reassure the regulated community that the adjudicatory process would be a fair and efficient one.

Given the deep concerns over separation of powers expressed throughout the congressional debates, it is incredible to suggest, as the Secretary does, that her prosecutorial constructions of ambiguous regulations are entitled to *Chevron*-style deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The administrative structure of the OSH Act was the "key issue" that "polarized labor and management" during Congress' deliberations. Senate Report at 54 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 193. There was great concern "on the part of employers . . . [and] in the mind of the average citizen, that the Labor Department always . . . is most sympathetic in its attitude toward the labor organizations." *Leg. Hist.* at 476 (statement of Sen. Holland). For these reasons, Congress installed "an agency that will be respected and is capable, impartial, and objective in its approach." *Id.* Accepting the Secretary's position would prevent the Commission from fulfilling this role and would unravel the political compromise struck by Congress; indeed, it would allow the Secretary to act as prosecutor and judge, and it would deprive the Commission of the authority necessary for it independently and effectively to resolve the legal and factual questions presented to it. There is simply no statutory basis for taking these steps.

B. The Secretary And The AFL-CIO Misapply General Principles Of Administrative Law

The Secretary and the AFL-CIO attempt to justify their effort to unravel the legislative compromise struck in the OSH Act by reference to general principles of ad-

ministrative law. *See* Pet. Br. 18-20; AFL-CIO Br. 3-6. But the general principles of administrative law that they cite do not support their effort.

First, contrary to the Secretary's suggestion (Pet. Br. 18-20), her status as a "policymaker" under the OSH Act does not require the courts to give "controlling weight" to the interpretations that she develops in the adjudicative (*i.e.*, prosecutorial) process. As this Court noted in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212, the deference principles of *Chevron* "have never [been] applied . . . to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *See also Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971). On the contrary, the deference principles of *Chevron* have been applied only to agency interpretations that are in a form that Congress intended to have the force and effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). *See generally* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5); Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1, 4-5, 30-36 (1990). There is no basis for suggesting that Congress intended citations issued by the Secretary (or pleadings filed in support of those citations) to create such legally binding norms.

Second, the Commission's function as the administrative adjudicator under the OSH Act in fact includes a policymaking function. As the Secretary concedes (Pet. Br. 20-22), the adjudicatory function of the Commission necessarily encompasses the power to make declarations of law.[4] When this power is placed in an administrative

[4] The AFL-CIO plainly errs in suggesting (AFL-CIO Br. 7-8) that the Commission's adjudicatory function is simply that of a fact-finder. The statute authorizes the Commission to issue "orders" and assess penalties, as well as to find facts, and that authorization presumptively, if not necessarily, includes the power to declare the law. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262; *Brennan v. OSHRC*, 492 F.2d 1027, 1032 (2d Cir. 1974). *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216, 221 (Scalia, J., concurring). Indeed, the Commission's statutory authorization is essentially identical to that of the NLRB (*compare* 29 U.S.C. §§ 659(c), 660 *with* 29 U.S.C. §§ 160(c), (e)), and there is no plausible argument that the NLRB is a mere "fact-finder."

agency, it implicitly encompasses a substantial policymaking component. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC. v. Chenery Corp.*, 332 U.S. at 202-03; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J. concurring). Indeed, as noted above (at 16, 18-19), the legislative history of the OSH Act makes clear that the Commission's adjudicatory powers were conceived by Congress as a mirror-image of the adjudicatory powers of the NLRB and the FTC, two agencies that have long been recognized to exercise policymaking authority through adjudication.[5]

Third, contrary to the suggestion of both the Secretary and the AFL-CIO (Pet. Br. 20-21 n.17, 25; AFL-CIO Br. 3-6, 12-13), the Secretary's role in promulgating the coke oven emissions standard does not require that her interpretation of those regulations be given "controlling weight" by the courts. To begin with, the Secretary did not draft the relevant section of those regulations,[6] and

[5] The attempt of the Secretary and the AFL-CIO (Pet. Br. 22-24; AFL-CIO Br. 7-8) to equate the Commission's law-declaration powers with the law-declaration powers of a district court is unfounded. The Commission, unlike a district court, is part of the administrative framework in which Congress vested the discretion for implementing the OSH Act. Moreover, the Commission, unlike a district court, reports to the President and thus, at least indirectly, is democratically accountable. Finally, the Commission, unlike a district court, is required to have expertise in the field of occupational safety and health. 29 U.S.C. § 661(a).

[6] The relevant provision, 29 C.F.R. § 1910.134(e)(5), which is incorporated by reference into the coke oven emissions standard, is a so-called "national consensus standard." It was drafted by the American National Standards Institute and adopted by the Secretary pursuant to the requirements of 29 U.S.C. § 655(a). *See* Pet. App. 42a.

she therefore cannot properly claim any special insights into its original meaning.[7] Moreover, although the Secretary's involvement in the promulgation of the regulation establishes that she has a delegation of congressional authority wide enough to reach this interpretive issue, it does not establish that she has actually exercised that authority in a form sufficient to have the force and effect of law; on the contrary, as noted above (at 20), her means of expression on this issue—*i.e.*, her citation of CF&I, and her solicitor's pleadings—plainly fail to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Finally, even if the author of a regulation is ordinarily entitled to say what it means, the OSH Act clearly denies the Secretary the authority to do so in the adjudicative process (because, under this statute, the Commission has the final say on questions of law and fact at issue in that process).[8]

Fourth, the expertise and experience that the Secretary has acquired in enforcing these regulations similarly does not, as the Secretary and the AFL-CIO suggest (Pet. Br. 25-26; AFL-CIO Br. 13-14 & n.10), justify giving "con-

[7] The Secretary misses the mark in suggesting (Pet. Br. 25 n.23) that her role in adopting the standard is a "policy" determination worthy of deference in its own right. The underlying interpretive question here is not whether adoption of the standard would "result in improved safety or health," the determination to be made by the Secretary under 29 U.S.C. § 655(a), but whether the language of the regulation (that she did not draft) was intended by its drafters to require fit testing in a test atmosphere.

[8] Of course, the Secretary's views are still entitled to weight. *See Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). But the Commission reasonably rejected the Secretary's interpretation—because it is a product of a compliance officer's mistake, is inconsistent with the structure of the regulations in issue, and is inconsistent with prior positions of OSHA. *See* Pet. App. 41a-44a & n.14. Thus, the court below had to give "controlling weight" to the Commission's interpretation—because it is reasonable, within the delegated authority of the Commission, and in a form intended by Congress to have legal effect.

trolling weight" to her prosecutorial interpretations. For one thing, it is the Commission, not the Secretary, who is by statute deemed expert and experienced with respect to these matters. *See* 29 U.S.C. § 661(a). For another, while the Commission reviews only contested citations, the absolute number of such contested citations is quite large; and, as a practical matter, it is only these contested citations that involve issues sufficiently substantial to provide any "vision" about the OSH Act program as a whole. In all events, expertise and experience are not the sole basis for *Chevron*-style deference from the courts; while expertise and experience contribute to the ability of an agency to persuade the courts, they do not properly contribute to the power of an agency to control the courts. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976); *Skidmore v. Swift & Co.*, 323 U.S. at 140.

Finally, there is no basis for the Secretary's suggestion (Pet. Br. 26-27) that a rule of deference to the Secretary, rather than to the Commission, is necessary to prevent "the stability of the OSH Act regime" from being undermined. A rule of deference to the Commission, rather than the Secretary, has prevailed in a large number of the courts of appeals, and the Secretary offers no evidence that compliance efforts have been unduly impaired in those judicial circuits. Indeed, there is no reasonable basis for believing that any such impairment has or will occur: the Secretary has an inherent advantage in the prosecutorial process (since she can pressure employers to settle merely by the threat of penalties and adverse publicity), and she is always free to clarify or amend her regulations through the rulemaking process. *See* Shapiro, *supra*, 78 Harv. L. Rev. at 923. In any event, the administrative law and statutory principles establishing the rule of deference to the Commission (and not to the Secretary) are "so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than to one

whose authority is limited to interpreting it." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 551.

C. The Statutory Analogues To Which The Secretary Points Do Not Support Her Cause

Finally, the Secretary points to "analogous statutory schemes" and argues (Pet. Br. 33-36) that they inform interpretation of the OSH Act's administrative structure. This contention is incorrect.

1. The Secretary first points (Pet. Br. 33-34) to the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, and this Court's decision concerning the LHWCA in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) (*Pepco*). But neither *Pepco* nor the LHWCA supports the Secretary's position here.

In *Pepco*, the Court ruled that, under the plain language of the Act, a partially disabled individual's compensation award was limited to a statutory schedule and could not be increased through use of a more generous formula applicable to non-scheduled injuries. 449 U.S. at 273-74. In a footnote, the Court dismissed the Benefits Review Board's (BRB) contrary conclusion, and commented that the Board "is not a policymaking agency" and thus is entitled to no special deference. *Id.* at 278 n.18. This statement, however, plainly constitutes *dicta*; the Court already had found the statutory language unambiguous, which was the "end of the matter." *Chevron*, 467 U.S. at 842. The *Pepco* footnote thus cannot carry authoritative weight here.[9]

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[9] Indeed, the Secretary's effort to rely on *Pepco*'s statement is undercut by her own admission (Pet. Br. at 34 n.33) that at least two courts of appeals have declined to follow it. Surely the Court should resolve the split in judicial authority under the LHWCA before considering the extension of any LHWCA-based conclusion to this separate statutory scheme.

In any event, there is no basis for importing *Pepco*'s comments on the BRB's role under the LHWCA into the vastly different OSH Act scheme. The BRB is appointed by the Secretary and exercises adjudicatory authority only "as delegated by the Secretary." 33 U.S.C. § 921 (b)(1). Moreover, proceedings before the BRB do not seek to identify violations of a regulatory command or impose a penalty, and the Secretary does not appear before the BRB in a prosecutorial role; rather, the BRB serves to review compensation orders issued by Deputy Commissioners appointed by the Secretary to review disability or death claims filed by private parties. *Id.* §§ 919, 940. The Commission, by contrast, is established as an independent agency outside the Department of Labor, and the individual Commissioners are appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 661. In addition, proceedings before the Commission involve violations of statutory and regulatory commands, and may result in imposition of substantial penalties. *Id.* §§ 654(a)(2), 666. The Secretary appears before the Commission in a prosecutorial capacity, thus triggering a greater concern with separation of functions, *see, e.g.*, 5 U.S.C. § 554(d), a concern reflected throughout the OSH Act's legislative history. *See, e.g.*, Senate Report at 56 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 195; *Leg. Hist.* at 298 (statement of Sen. Saxbe). In short, the Secretary is mixing apples and oranges in analogizing the deference issue under the OSH Act to the deference issue under the LHWCA.

2. The Secretary next looks (Pet. Br. 35-36) to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801 *et seq.*, to support her deference argument. But the Mine Act does not do so.

To begin with, while the administrative structures of the Mine Act and the OSH Act have much in common, there are also important differences. The statutory language creating and empowering the Commission and the

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Federal Mine Safety and Health Review Commission (FMSHRC) is not the same. *Compare* 29 U.S.C. §§ 659-661 *with* 30 U.S.C. §§ 815, 823. Nor are the delegations of authority to the Secretary under the two statutes the same. *Compare* 29 U.S.C. §§ 654-658 *with* 30 U.S.C. §§ 811, 813-816. Moreover, as this Court held in *Donovan v. Dewey*, 452 U.S. 594, 600-03 & n.7 (1981), the OSH Act and the Mine Act are distinct in their scope and purposes. Thus, there is every reason to doubt that conclusions about deference under one of these statutes can automatically be imported into the other.

In any event, the cases do not establish that the Secretary's prosecutorial interpretations are in fact given "controlling weight" under the Mine Act. On the contrary, much as the lower courts have reached conflicting decisions in evaluating the OSH Act's allocation of administrative authority, they have developed a checkered pattern in evaluating the respective roles of the Secretary and the FMSHRC under the Mine Act. For example, in *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988), the court found FMSHRC's interpretation to be entitled to *Chevron*-style deference, although it noted that the degree of deference is "diminished . . . when the Secretary of Labor favors an interpretation at odds with that adopted by the Commission." Moreover, in *Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1436-38 (D.C. Cir. 1989), the court merely granted deference to an authoritative pronouncement of the Secretary; while, in *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1136 (D.C. Cir. 1987), the court rejected the Secretary's construction and affirmed the FMSHRC. Finally, in *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.), the court did not give the Secretary's views the type of controlling weight that she seeks here; instead, Justice (then-Judge) Scalia observed that "there is deference and there is deference—and the deference accorded to the agency on a point such as this is not overwhelming." *Id.* at 537. And, in evaluating the

administrative structure of the Mine Act, Justice Scalia was simply adhering to prior circuit precedence—specifically, *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984), where the court granted deference to the Secretary because it had before it "just the sort of determination the Secretary was empowered by Congress to make." That is not the case here.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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SEPTEMBER 1990